No. 11878

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of Charles E. Hill, Doing Business as Hill Machine Tools,

Appellee.

APPELLANT'S REPLY BRIEF.

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Statement.

It is to be noted that appellee, in his discussion of the merits of this controversy, commencing on page 21 of his brief, in no way attempts to uphold or justify the Findings of Fact and Conclusions of Law of the Referee and Judge, and does not traverse appellant's claim that they are not supported by the evidence, are against the evidence, and that therefore the order of the District Judge, based on such findings, is error.

It is also to be noted that appellee does not attempt to answer appellant's contention that a waiver, to be relied upon, must be pleaded and proved. Instead, it now appears from appellee's brief, that he is adopting a new theory, viz. Election of Remedies, to bolster his claim to this property.

ARGUMENT.

The Sole Issue Before the Court in This Case Is Whether Appellee Made a Legal Tender of the Money Due Appellant Under Her Demand of February 5, 1946.

What we are concerned with here is a petition of a Trustee of a bankrupt vendee, admittedly in default of his obligations under a real estate contract, asking a Court of Equity to decree specific performance against the vendor, and this without making any showing, either by way of pleading or proof, to excuse or explain the breach.

The appellee blandly insists that appellant, after effective defaults on the part of the vendee, both as to the monthly payments and taxes, by demanding the total sum due, waived all previous defaults and the effect of such defaults. As the record before this Court now stands, it is admitted that the bankrupt vendee was in default for five monthly payments amounting to $1,000.00 and in default for the non-payment of the taxes on the property. It is admitted that such defaults became effective thirty days after the installment payment was due. It is admitted that vendor had a lawful right, by reason of an effective default, to demand immediate payment of the entire sum due. It is admitted that she made an effective demand for said total sum.

Up to this point, there is no disagreement, but from this point on appellee attempts to develop a theory which we believe is not only illogical but untenable. The only possible way vendor acquired the right to demand immediate payment was by vendee's default. Vendee now contends that, by her exercising that right, she waived past defaults, including the non-payment of taxes; that by the exercise of this lawful right the contract was

reinstated and was in full force and effect and binding on both parties. We do not believe it is necessary to cite to the Court any additional authorities for the proposition that, on February 5, 1946, all the rights of the vendee under this contract were canceled and terminated and under the terms of the contract, in this case, no affirmative act on the part of the vendor was necessary to accomplish this. No notice to the vendee was required, and no notice was necessary as the vendee had specifically agreed to this event by the terms of the written contract itself. No act of the vendor could breathe life into this contract so far as the vendee was concerned. If appellee's theory in this regard is pursued to its logical conclusion, it reduces itself to an absurdity.

Under the law of *Glock v. Howard and Wilson,* 123 Cal. 1, upon the vendee's failure to pay the installments when due, and to pay the taxes, all his rights under the contract were terminated and canceled.

If at this point in the proceedings vendor had brought an action in ejectment against the vendee, the vendee could not have maintained, without equitable excuse, a defense to the action and summary judgment would have been given vendor. *Skookum Oil Company v. Thomas,* 162 Cal. 539; *Connolly v. Hingley,* 82 Cal. 642; *Barcroft v. Livacich,* 35 Cal. App. (2d) 710. And if such action were brought, it could not be successfully contended that, by so doing, the vendor waived the defaults which gave right to the action. The notice given by appellant to appellee, on February 8, 1946, simply notified the vendee that all his rights under the contract had been canceled and terminated by reason of his own defaults.

After the rights of the vendee under the contract were thus terminated and canceled by reason of the

defaults of the vendee, the appellant vandor had a choice of remedies given her by the contract. She chose to demand the entire amount due, payable at once. By so doing, she did not waive anything. She wanted this transaction terminated. She chose the most equitable remedy available to her. It gave the vendee an opportunity to pay the agreed price and obtain a deed and title to the property. It did not attempt to forfeit any of the money that he had paid in under the contract, as it gave him full credit for all sums he had previously paid. It is admitted that bankrupt vendee did not meet this demand by payment and it leaves the sole question to be decided by this Court, on the merits of the controversy, did vendee's actions on February 11 amount to a legal offer or tender of payment.

The appellee does not attempt to answer the contention of appellant that, under the provisions of the Civil Code cited by appellant in her opening brief, no valid tender was made.

The case of *Boone v. Templeman*,[1] 158 Cal. 290, 110 Pac. 947, cited and relied upon by appellee, has no bearing

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[1]The opinion in this case is on a ruling sustaining a general demurrer. The sole question presented was the sufficiency of the facts stated in the complaint to constitute a cause of action. It was an action to enforce specific performance of a contract, for the sale of land, against the vendor. The contract was executed October 17, 1901, and provided for the balance of the purchase price, amounting to $2,150.00, to be payable in monthly installments of $50.00 each, to be paid on the 5th day of each month. Although time was made of the essence, vendee paid only the first installment on time. While sixty-four months passed vendee made but five payments totaling $700.00 and no protest was ever made by seller concerning such contempt for the obligation to pay on the 5th day of the month. In July 1906, without previous notice, seller served notice of rescission. The vendee offered to pay the entire balance due. The Court held that seller's offer to pay the entire balance must be accepted for the reason that vendor

on the facts of this case. Neither does the case of *Security-First National Bank v. Hauer,*[2] 47 Cal. App. (2d) 302, cited by appellee at page 24 of his brief.

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had waived all breaches which had occurred at or prior to the times such payments were made and for that reason was estopped to insist on a forfeiture of the contract. The Court said, "We think, from these facts, a Court might infer a waiver of the conditions regarding forfeiture and time, and that they supported the general allegation of the complaint that Templeman had waived those conditions." All that *Boone v. Templeman* holds is that a vendor may waive the default of a vendee, and in that particular case the complaint alleged facts which, if proven, would constitute waiver. At page 299 of the case, the Court said: "In the case at bar, upon the facts shown by the complaint, a forfeiture had been waived and thereafter time was not essential but its efflux was a material fact bearing upon the right of Boone to enforce performance by suit."

[2]This case was an appeal from a motion vacating a summary judgment on the grounds of fraud. The facts were as follows: Vendor sold an orange grove to vendee for $22,340.00. Vendee paid $5,340.00 cash and agreed to pay the balance in ten annual installments. As additional security for the payment of the installments, vendee assigned to the vendor one-half of the proceeds of the 1940 orange crop, such proceeds to be applied on the last installment or installments of principal due under said agreement. The contract was made in February, 1940, and two months later, in April, 1940, vendor notified vendee it exercised its option to declare the entire amount due and, in event of failure to pay the entire amount on or before April 22, 1940, the vendor would declare a forfeiture, etc. In June, 1940, vendor brought action against the holder of the proceeds of the 1940 orange crop and made a motion for a summary judgment for the amount, averring that the sales contract had not been terminated. The Court granted judgment to vendor for one-half the proceeds of the 1940 crop, which amounted to $2,120.20. But before the judgment was entered, vendor served a notice of forfeiture on the vendee, forfeiting all amount that vendee had paid in under the contract. Upon receipt of vendor's notice, vendee filed a motion to set aside the original judgment granting vendor one-half the proceeds of the 1940 crop, on the grounds of fraud. The motion was granted and the vendor appealed. The Court affirmed the lower court and set aside the summary judgment. The facts of the case are different in every particular from the instant case, and all the Court held was that, in that particular case, the vendor could not forfeit the amount of money paid in by the vendee and also obtain judgment for the money in the hands of a stake-holder which was to be applied on the last installment of the contract. The ground for setting aside judgment was fraud on the part of the vendor.

Neither does his pointing out to the Court that the appellant, in her brief, inadvertently set out the date of the close of the escrow as May 1, 1946, rather than May 6, 1946. In either event, it was at least seventy-two days after appellant's demand for immediate payment, that any money was to be paid to her.

The oral and documentary evidence in this record shows conclusively, we believe, that the bankrupt vendee never had any money with which to meet the appellant vendor's demand; that the only money in sight was the money conditionally left by Bruno and Berg with the Angelus Escrow Service Company [Tr. 136], and that money was not available to the vendor until she signed escrow instructions and agreed to five other conditions which were not provided for in the contract, one of which was the waiting seventy-two days before she obtained any money, and even at that time a lesser amount than that to which she was entitled. In two recent cases decided by the California District Court of Appeal, *Wilson v. Security-First National Bank,* 84 A. C. A. 537 (decided March 17, 1948) and *Pitt v. Mallalieu,* 85 A. C. A. 100 (decided April 19, 1948),[3] the law applicable to defaulted

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[3]In the case of *Wilson v. Security-First National Bank,* vendee paid $2,750.00 down on the purchase of an apartment house for $40,000.00, but failed to make the additional payments as agreed. Vendee brings action to recover the amount paid. The Court held that a purchaser who has made an unexcused default under a contract for the sale of real property cannot maintain an action to recover money paid under the contract. The Court also construed the meaning of the word "wilful" as used in Section 3275 C. C., which provides for relief against forfeiture "except in case of grossly negligent, wilful, or fraudulent breach of duty," holding that the word "wilful," as used in that section, was synonymous with "voluntary, spontaneous, intentional," and as the breach in this case was intentional, it was "wilful" and no relief could be granted under 3275 C. C. The Court also, in referring to the

real estate contracts was exhaustively reviewed. In the *Pitt v. Mallalieu* case, in discussing the vendor's refusal to sign escrow instructions, the Court said:

> "Since the escrow instructions prepared by the plaintiff did not supplant the agreement (*Keeland v. Belmont Company,* 73 Cal. App. (2d) 6; 165 Pac. 930) defendant's refusal to sign them was no excuse for plaintiff's failure to proceed with his performance of an obligation as to which time was the essence. The requirements for his deposit of the balance within ninety days was not conditioned upon either defendant's signing escrow instructions at a definite time, upon the form of deed she would use, or upon her failure to consent to a modification of the agreement."

Here again, as in all important points raised by this litigation, appellee relies on waiver by appellant to bottom his rights. He now contends that, by reason of the fact that appellant did not object to the mode of offer of appellee, under the provisions of Section 1501 of the Civil Code, she therefore waived her rights to maintain her position that no tender or offer of performance was ever made to her. This waiver was not pleaded or proved, and is, of course, a tacit admission that vendee never made a proper offer of performance.

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case of *Glock v. Howard and Wilson,* 123 Cal. 1, said, "So far as the law set forth in this decision is concerned, its repeated affirmation in a long, uninterrupted series of cases has caused it to become settled doctrine under the rule of *stare decisis.*" In the *Pitt v. Mallalieu* case, the Court upholds the proposition, "In a contract for the sale of realty in which time is of the essence, failure of the purchaser to make payment within the time specified constitutes a breach, and no affirmative act by vendor is required to terminate the purchaser's right of enforcement." The Court in this case also held that waiver to be relied on must be pleaded and that to constitute waiver the holder of the right must intentionally relinquish such right after knowledge of the facts.

We want at this time to make serious objection to the statement of the appellee, appearing at line 13, page 29 of his brief, where he states, "The objections which appellant now makes to the tender are made for the first time on this appeal." The facts as disclosed by the record, and of which appellee is aware, are as follows:

Trustee, in his petition, alleged, "The said Charles E. Hill did tender to the said Jennie Wuchner the full sum then owing * * *" [Tr. 16, line 7] and appellant, in her answer, replied, "Said Jennie Wuchner denies that said contract was in full force and effect on the 11th day of February, 1946, and that Charles E. Hill tendered to said Jennie Wuchner the amount of $4,912.63, and denies Jennie Wuchner refused to accept such amount." [Tr. 22, line 20.] The record shows conclusively that the Referee did not base his Findings of Fact or Conclusions of Law upon any waiver by appellant as to the mode of offer or tender but squarely on the proposition that the appellee offered to pay all sums due appellant "at a time when the offer could be performed in accordance with the terms and conditions thereof." [Finding of Fact 4, Tr. 39; Conclusions of Law 4, Tr. 43.] Before the Findings were filed, and while they were still proposed, appellant filed written objections to said proposed Findings and Conclusions and specifically to the Findings of Fact and Conclusions of Law as to an offer of performance or tender. The objection as to Finding of Fact 4 was as follows: "That there was $4,912.63 for Jennie Wuchner there was not true; that there was no money on deposit for her in this escrow. * * * The evidence disclosed, and the Findings should show, that at the time of the alleged offer to perform, the buyers were not ready nor able nor willing to perform the terms of the contract

but on the contrary showed, by their own testimony, there was no money on deposit for the sellers anywhere and showed an absolute inability on the part of the buyers to carry out the terms and conditions of the contract"; [Tr. 30, commencing line 16], and her objection to Conclusion of Law 4 was as follows: "It was not in accordance with the terms and conditions of said agreement of sale and the evidence disclosed that it could not meet the demand of the sellers. Unequivocally, the testimony showed that the buyer did not have the money and that there was no money of any kind available in the escrow or elsewhere, and that the buyers did not have the ability, nor were they able or willing, to comply with the terms of the contract but, on the contrary, the evidence strongly showed a contrary situation." [Tr. 32, commencing line 20.]

The appellant at all times has maintained that there never was any legal tender or offer of performance made by appellee under the provisions of the Civil Code of California. By his argument, appellee admits this, but seeks to avoid it by setting up waiver by appellant. This waiver, so desperately relied upon by appellee, was not pleaded. Not one scintilla of evidence was introduced to the effect that appellant did or did not object to the mode of offer of performance. Neither the Referee nor the Judge mentioned it in their Findings or Conclusions. There is absolutely nothing in this record upon which a Court could pass on the question, one way or another, and it should be disregarded. We believe the following quotation from the recent case of *Pitt v. Mallalieu, supra*, at page 107, is pertinent:

> "Despite the absence of such allegations, plaintiff argues now that, after he had failed to make the deposit, defendant could have either declared a for-

feiture or treated the agreement as in force. There were many things that defendant could have done but they are irrelevant here as proof of her waiver of plaintiff's compliance with the agreement. The backbone of this controversy is plaintiff's behavior toward his written obligation to deposit $9,250.00. In lieu of performance, he now regales the Court with his argument that defendant's non action is the equivalent of his actual compliance."

We believe the case of *Allen v. Chatfield,* 172 Cal. 60, disposes of appellee's contention that appellant, by not objecting to the mode of offer of performance, at the time the offer was made, precludes her from objecting later. The Court held in referring to Section 1501 of the Civil Code and Section 2076, Code of Civil Procedure, that an offer of performance without ability to perform, does not put the other party in default, and the party to whom performance is offered is not required to accept it or to point out the inability to perform. The Court said: "The offer showed on its face the inability to perform according to the agreement and Allen was not required to accept it or point out the confessed inability." Of course in this case appellee did not even plead this point and it can not now be considered.

After a careful reading of the remaining points raised by appellee and the cases cited by him to support such points, we do not believe they in any way pertain to the facts in the instant case. As pointed out in our opening brief, appellant never refused to accept an offer of performance by the vendee for the simple reason that she never had the opportunity to do so because no offer was ever made to her. The actions of the bankrupt vendee in attempting to make an offer on February 11, belies the

belated claim of his trustee that he was prevented from making one by actions of the appellant on February 8, 1946. None of these matters were pleaded or proved, and should not now be considered. The sole question before this Court is: Did the Trustee prove, by a preponderance of the evidence, that the appellee made a legal and valid tender to appellant in accordance with the terms of the contract and the provisions of Sections 1485 to 1500, inclusive, of the Civil Code, and did the Trustee demonstrate, by his pleading and proof, that the actions of his bankrupt were such as to invoke the equitable powers of a Court of equity to decree specific performance of a contract. The evidence clearly shows the inability of the bankrupt vendee to make payment, and therefore he could not make a proper tender. The evidence conclusively shows that the only money produced was furnished by two strangers, who attached conditions to its use which the appellant did not have to perform. The record further shows that the Trustee admitted in open court that the bankrupt estate did not have any money except that which could be realized from the sale of the property. The following discussion on this point took place between the Referee and the attorney for Trustee:

> "The Referee: Mr. Gendel, has there been any tender made?
>
> Mr. Gendel: For the Trustee?
>
> The Referee: Yes.
>
> Mr. Gendel: No, except in the pleadings. The tender of the amount of any—
>
> The Referee (interrupting): Is that sufficient? Has the Trustee got the money?
>
> Mr. Gendel: The only place the Trustee will get it is from the sale of the property." [Tr. 87.]

Jurisdiction.

We do not believe any further extended discussion under this heading is necessary. We would like to point out, however, that *In re Logan,* 196 Fed. 678, cited in our opening brief, does sustain and uphold the exact point for which it was cited, *viz.:*

> "Of course, mere possession is not enough. The findings must be and the facts must warrant the finding that the bankrupt was the true owner, and that he held as owner."

We believe that *Federal Farm Mortgage Corp. v. Davis,* 132 F. (2d) 663, and *Starr King School v. Kine,* 146 F. (2d) 8, are particularly in point. These two cases hold that even in petitions filed under Section 75 of the Bankruptcy Act, providing for the relief of farm debtors, the fact that they are farmers and are holding possession of the land under a real estate contract is not enough. It also must appear that petitioners were owners of the property and its possession by them was rightful. We believe it to be elemental that whenever any rights are conferred by reason of possession, the law means and assumes lawful possession and not the possession of a trespasser, which is the most the Trustee can claim in this case. We reassert our claim that, as this was a controversy between the Trustee and a stranger to the proceedings, and that as the bankrupt did not have legal or equitable ownership, or legal possession of the real estate, and because a summary proceeding was not necessary, the petition of the Trustee should be dismissed and the property here involved be stricken from the record. The comment of counsel for appellee, at page 10 of his brief, to the effect that appellant consented to the jurisdiction of the Bank-

ruptcy Court by reason of remarks of her counsel in refusing to stipulate that the Bankruptcy Court had jurisdiction, is without merit, as the entire record discloses. Counsel for Trustee seems to have a penchant for claiming rights based on alleged waivers and estoppels.

Attorney's Fees.

This being an equitable action, and as the contract provided for the payment of attorney fees by the vendee in event suit was instituted, we believe it is clearly within the Court's power to decree attorney fees for appellant's counsel. The equities merit such award.

Conclusion.

We do not believe appellee's brief in any way sustains the Findings of Fact and Conclusions of Law of the Referee and District Judge. The record shows conclusively that bankrupt was in default and that he failed to make payment, as it was his duty to do, and that his action on February 11, 1946, did not amount to an offer of performance or tender, and that on the day this petition was filed the said bankrupt did not have any ownership in or lawful possession of the real estate involved herein, and therefore Trustee's petition should be dismissed and costs and attorney fees be allowed as prayed for in appellant's opening brief.

Respectfully submitted,

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